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IN THE

Supreme Court of the United States

October Term, 1969

No. 538

LAVINO SHIPPING COMPANY,

Petitioner

v.

AMERICAN-WEST AFRICAN LINE, INC., D/S A/S DEN NORSKE AFRIKAOG AUSTRALIE LINIE, WILHELMSENS DAMPSKIBSATIESELSKAB, A/S TONSBERG, A/S TANKFART IV, A/S TANKFART, V, A/S TANKFART VI, and Motor Vessel TANA, Her Engines, Boilers, Tackle, Etc.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Lavino Shipping Company, respectfully prays that a Writ of Certiorari may issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on July 1, 1968, affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 17,085, and to review the final judgment of the said Court of Appeals entered on July 22, 1968, in the related appeal docketed therein as No. 17,110.

OPINIONS OF THE COURTS BELOW

The judgment of the District Court for the Eastern District of Pennsylvania, consisting of the Findings, Conclusions, and Discussion of the Trial Judge in admiralty, is reported in 1968 American Maritime Cases at pages 139 to 146, but not in the Federal Supplement, and is annexed hereto at pages 13 to 21 of the Appendix.

The opinion of the Court of Appeals filed on July 1, 1968, is unreported and is annexed hereto as pages 22 to 29 of the Appendix.

The amending opinion of the Court of Appeals filed on July 22, 1968, likewise unreported, is annexed hereto as pages 29 to 31 of the Appendix.

JURISDICTION.

Jurisdiction in the District Court was based upon the admiralty jurisdiction of the federal court in maritime cases. Libel was filed by A. C. Israel Commodity Co., Inc., as consignee of a cargo of bagged cocoa beans shipped from Lagos, Nigeria, to Philadelphia, Pennsylvania, against the ocean carrier Motor Vessel TANA in rem, and against her owners in personam, claiming damages for short delivery. The ocean carrier impleaded the present petitioner, Lavino Shipping Company, for indemnity on the ground that petitioner, as the contracting stevedore at Philadelphia, had failed to account for the shortage.

The trial resulted in an award by the court as trier of fact in admiralty in favor of the consignee and against the ocean carrier for the market value of the missing bags. The Trial Judge also granted the ocean carrier full indemnity against petitioner, and in a subsequent order awarded the ocean carrier counsel fees and expenses allocable to defending the claim of the consignee. Due to the

lapse of time between these separate judgments, petitioner was required to take two appeals, which were later consolidated for purposes of briefing and argument.

The Court of Appeals dismissed petitioner's appeal from the award of indemnity (No. 17,085) but remanded the portion of the appeal pertaining to the award of counsel fees and expenses (No. 17,110) for the purpose of reviewing the allocation. After petitioner and respondents filed Petitions for Rehearing reminding the court that the amount of the allocation, provided such expenses were recoverable under the circumstances, had been agreed upon by counsel, the amending opinion affirmed both judgments.

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

QUESTION PRESENTED.

Does Section 1303(4) of the *Carriage of Goods by Sea Act*, 46 U. S. C. A., Sec. 1303(4), which provides that as between the ocean carrier and the shipper or consignee the carrier's bill of lading shall be prima facie evidence of condition and quantity of the cargo designated therein, constitute prima facie evidence of quantity against the stevedore company which discharges the cargo, in an action by the ocean carrier to recover indemnity for alleged short delivery to the consignee?

STATUTORY PROVISIONS INVOLVED.

The statutory provision directly involved herein is Section 1303, Subsection (4), of the *Carriage of Goods by Sea Act*, 49 Stat. 1208, 46 U. S. C. A. Section 1303(4), which must be read in the context of Subsections (3) and (5). These provisions are set forth verbatim at pages 11 and 12 of the Appendix.

STATEMENT OF THE CASE.

Motor Vessel TANA loaded a quantity of bagged cocoa beans at Lagos, Nigeria, in May, 1961, designated for various consignees in Philadelphia, Pennsylvania. According to the quantities shown on the bills of lading 80,000 bags were consigned to A. C. Israel Commodity Co., Inc.

The ship's cargo manifest and cargo stowage plan for the voyage likewise indicated that 80,000 bags were consigned to Israel, but as the Trial Judge found after hearing all of the testimony "There is no evidence that the vessel made its own count of the bags at Lagos." (Findings of Fact No. 6, *infra,* page 14.) Since the ship made no count of its own, it necessarily follows that the manifest and the stowage plans depended entirely, like the bill of lading, on the shipper's count. There was no evidence to indicate when, where, by whom, or under what conditions these quantities were ascertained.

The ocean carrier appointed petitioner as its agent to handle the business of the vessel upon arrival at Philadelphia on June 20, 1961. Petitioner, which also furnishes stevedoring services, discharged the cargo. The bags were transferred to an adjacent pier shed which was fully enclosed, placed under constant guard (Findings of Fact No. 18, *infra,* page 16), and delivered to consignees at the pier on written order. A portion of Israel's shipment was delivered to customers on order, and except for an instance when five bags were delivered in excess of the amount covered by the order there were no delivery errors.

In the course of unloading the cargo, petitioner's checkers tallied the bags in each hold. Petitioner's tally records introduced at the trial disclosed considerable discrepancy between the quantities shown by the ship's cargo stowage plan and the quantities actually stowed in several holds and

compartments. The final tally showed that the ship had carried 2,309 bags less than the total shown by the bills of lading, manifest, and cargo stowage plan. (Findings of Fact No. 15, *infra,* pages 15 and 16.) There was testimony that several other ships from Nigeria had reported similar shortages. (Findings of Fact No. 16, *infra,* page 16.)

By July 2, 1961, all bags designated for other consignees had been delivered from the pier, leaving 43,800 bags of Israel's shipment according to the quantities shown on the ship's documents. When petitioner's checkers tallied this lot on transfer to railroad cars, they counted a shortage of 341 bags. When the shipment was unloaded and tallied at the warehouse in Philadelphia, the shortage was said to be 473 bags out of 43,800.

The Trial Judge concluded that petitioner must have obtained possession of 80,000 Israel bags and that, having failed to account for delivery of a lesser number, petitioner was responsible for the shortage. This conclusion was predicated on the erroneous assumption that the *Carriage of Goods by Sea Act* made bill of lading quantities prima facie evidence against the stevedore company. The award of indemnity depended on this misinterpretation of the federal statute, inasmuch as the Trial Judge found that "There was no evidence other than the documents and the admission of the ship that the vessel had received the acknowledged amount." (Findings of Fact No. 6, *infra,* page 14.)

Neither of the two opinions filed by the appellate court made any reference to this fundamental error of law although it was emphasized in petitioner's brief, oral argument, and petition for rehearing.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Decision Conflicts With the Applicable Decisions of This Court.

By affirming the judgments of the District Court, the Court below has sanctioned the extension of the *Carriage of Goods by Sea Act*, Section 1303(4), to give an ocean bill of lading prima facie effect against a stevedore company. The Trial Judge left no doubt that the indemnity award was based on the statutory presumption in substitution for customary proof that the indemnitee shipowner had actually received 80,000 Israel bags at Lagos, and had delivered 80,000 such bags into the possession of the stevedore company at Philadelphia.

Under "Discussion" the Trial Judge starts with the following statement of law (*infra*, page 19):

> "There is no dispute as to the applicable essential principles of law controlling this litigation. First, the bills of lading are prima facie proof of their content which however can be rebutted by competent evidence. * * *."

At another point (*infra*, page 20), the Trial Judge lists his reasons for blaming the shortage on petitioner, citing first of all "the prima facie effect of the bills of lading." In Conclusions of Law No. 3, the Trial Judge states (*infra*, page 21):

> "3. The bills of lading are prima facie evidence of the condition and quantity of the cargo. 46 U. S. C. A. Sec. 1303(3). Lavino has not rebutted their prima facie effect."

The court erred in citing Sec. 1303(3) instead of Sec. 1303(4), but his misapplication of the latter section against

the stevedore company was reversible error and should have been corrected by the appellate court.

Section 1303(4) provides that the ship's bill of lading shall be prima facie evidence of condition and quantity of the cargo designated therein, but the Act regulates the responsibility of the *carrier* to the *shipper or cargo owner.* It does not regulate the responsibilities of the ship's agent or stevedore company. A stevedore or agent is neither bound by nor entitled to the benefit of the bill of lading to which he is not a party.

This principle was made abundantly clear by this Court in *Herd & Co. v. Krawill Machinery Corp.*, 359 U. S. 297, 1959 A. M. C. 879 (1959), at page 301:

> "The Act is clearly phrased. It defines the term 'carrier' to include 'the owner or the charterer who enters into a contract of carriage with the shipper.' Sec. 1301(a). It imposes particularized duties and obligations upon, and grants stated immunities to, the 'carrier.' Secs. 1302, 1303, 1304. Respecting limitation of the amount of liability for loss of or damage to goods, it says that 'neither the carrier nor the ship' shall be liable for more than $500 per package. Sec. 1304(5). It makes no reference whatever to stevedores or agents."

This decision overruled a line of cases in which the federal courts had held that the stevedore or agent was entitled to the benefit of time or damage limitations granted to the ocean carrier under the Act. Such had been the holding in *A. M. Collins & Co. v. Panama R. Co.*, 197 F. 2d 893, 896 (5th Cir., 1952). In *Herd, supra,* at page 305, this Court said:

> "The holding of the majority in *Collins* that the liability of a negligent agent of a carrier, though not limited by any statute or contract, is nevertheless

limited by and to the extent of the limitation granted by the shipper to the carrier in the bill of lading, simply because the agent is performing some part of the work thereby undertaken by the carrier, is clearly contrary to the above-cited decisions of this court."

This Court then quoted with approval the following English law as stated in *Wilson v. Darling Island Stevedoring & Lighterage Co., Ltd.*, (1956) 1 Ll. L. Rep. 346 (1956), Argus Law Rep. 311, 29 Austral. L. J. 740:

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. * * *."

The award of indemnity in the present case, based on substitution of Section 1303(4) for proper proof that petitioner actually received the allegedly missing bags, is in direct conflict with *Herd, supra,* and the decisions there cited.

II. This Decision Has Sanctioned the Erroneous Interpretation of a Federal Statute Which Should Be Corrected by This Court.

The affirmance of the judgments without any reference to the *Carriage of Goods by Sea Act* amounts to appellate approval of the fundamental error of law committed by the District Court. As it stands, the decision of the appellate court is authority for extending the prima facie evidence provisions of Section 1303(4) to the petitioner, who was serving as both agent and stevedore for the ocean carrier.

It is unjust and inequitable to impose this burden on ship's agents or stevedore companies, and as this Court decided in *Herd, supra,* the statute was not intended to apply to them. The practical effect of such an extension is to shift the burden of proof from the ocean carrier, where it belongs, to the stevedore company at the unloading port.

It is the carrier which is in the most favorable position to prevent mistakes in recording the quantity loaded, by making its own count when the cargo is brought on board the vessel. The burden of resolving disputes relating to loading records should rest on the carrier, which is the rationale of Section 1303(4) as it relates to shippers and cargo owners. This burden should not be shifted to a stevedore company in a distant port when the ocean carrier seeks indemnity for short delivery of cargo which may never have been loaded.

Misapplying the prima facie evidence provision of the statute leads to situations like the present, where the ocean carrier made no discernible effort to determine the accuracy of the shipper's loading count at Lagos, but turned its entire effort to recovering indemnity from the unloading stevedore. In this case the result was at most a presumption, since no negligence was shown on the part of petitioner in discharging, storing, or distributing the bags of cocoa beans.

The present decision imposes an unjust and intolerable economic burden on contract stevedoring in every American port. It virtually makes the stevedore an insurer of the carrier's obligation under its bill of lading. Contract stevedores throughout the nation are already laboring under severe financial difficulties without this added burden of responsibility.

The Court below invoked *McAllister v. U. S.,* 348 U. S. 19, 20 (1954), in summarily sustaining the conclusion of the

Trial Judge that "the bags were received but were lost by Lavino." (*infra,* page 23). The *McAllister* rule clearly applies to reliance on testimony of witnesses whom the Trial Judge saw and heard. No witnesses in this case testified that 80,000 Israel bags were received by Lavino and that some of them were lost. On the contrary, the only testimony relating to the quantity discharged showed that the ship's documents were incorrect. The *McAllister* rule does not apply to misinterpretation of federal law or statutes, which may be—and in this instance should have been—reviewed on appeal.

CONCLUSION.

A writ of certiorari should be granted in accordance with the prayer of this petition.

Respectfully submitted,

THOMAS F. MOUNT,
HARRISON G. KILDARE,
Counsel for Petitioner.

Dated: Philadelphia, Pennsylvania